SolarCity Corp. *and* Anita Beth Irving. Case 32–CA–128085

July 29, 2020

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On December 22, 2015, the National Labor Relations Board issued a Decision and Order finding that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining and enforcing mandatory arbitration agreements. *SolarCity Corp.*, 363 NLRB No. 83 (2015). Applying *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), the Board found that the agreements unlawfully required employees, as a condition of their employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. *SolarCity*, 363 NLRB No. 83, slip op. at 2–4. The Board also found that the agreements violated the Act on the basis that employees reasonably would construe them to restrict their access to the Board's processes. Id., slip op. at 4–6.

The Respondent filed a petition for review with the United States Court of Appeals for the Fifth Circuit. The Board filed a cross-application for enforcement. On May 21, 2018, the Supreme Court held that employer-employee agreements that contain class- and collective-action waivers and require individualized arbitration do not violate Section 8(a)(1) of the Act and should be enforced as written pursuant to the Federal Arbitration Act (FAA). *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S.Ct. 1612, 1632 (2018).

On August 15, 2018, the Fifth Circuit granted the Board's motion to vacate the portion of the Board's Order governed by *Epic Systems* and to remand the remainder of the case for further proceedings before the Board. On March 27, 2020, the Board issued a Notice to Show Cause why this case should not be remanded to the administrative law judge for further proceedings in light of the *Boeing*[1] standard, discussed below. No party filed a response. We find that a remand is unnecessary because the only remaining issue in this case concerns the facial lawfulness of the Respondent's agreements, and those agreements are already part of the record before us.

The National Labor Relations Board[2] has reviewed the entire record. For the reasons discussed below, we find that the Respondent's agreements do not unlawfully restrict access to the Board and its processes in violation of Section 8(a)(1). Accordingly, we vacate the underlying decision and dismiss the complaint.[3]

I. FACTS

The Respondent, located in San Mateo, California, is engaged in the business of providing solar energy services. Since at least November 2013, the Respondent has maintained an "At-Will Employment, Confidential Information, Invention Assignment, and Arbitration Agreement" applicable to its California employees (the California 2013 Agreement). The Respondent revised the agreement in March 2014 (the California 2014 Agreement).

In relevant part, the California 2013 Agreement provides as follows (emphasis added):

> *12. Arbitration*
>
> A. **This Agreement applies to any dispute arising out of or related to Employee's employment, including termination of employment, with the Company** or one of its affiliates, subsidiaries or parent companies. Nothing contained in this Agreement shall be construed to prevent or excuse Employee from utilizing the Company's existing internal procedures for resolution of complaints, and this Agreement is not intended to be a substitute for the utilization of such procedures. Except as it otherwise provides, this Agreement is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law, and therefore this Agreement requires all such disputes to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial. **The Agreement also applies, without limitations, to disputes regarding the employment relationship,** trade secrets, unfair

[1] *Boeing Co.,* 365 NLRB No. 154 (2017).

[2] Member Emanuel, who is recused, is a member of the panel but did not participate in this decision on the merits.

In *New Process Steel v. NLRB*, 560 U.S. 674 (2010), the Supreme Court left undisturbed the Board's practice of deciding cases with a two-member quorum when one of the panel members has recused himself. Under the Court's reading of the Act, "the group quorum provision [of Sec. 3(b)] still operates to allow any panel to issue a decision by only two members if one member is disqualified." *New Process Steel*, 560 U.S. at 688; see also, e.g., *NLRB v. New Vista Nursing & Rehabilitation*, 870 F.3d 113, 127–128 (3d Cir. 2017); *D. R. Horton*, above, 357 NLRB at 2277 fn. 1; *1621 Route 22 West Operating Co.*, 357 NLRB 1866, 1866 fn. 1 (2011), enfd. 725 Fed.Appx. 129 (3d Cir. 2018).

[3] In a related case that is also issuing today, we address whether the Respondent violated Sec. 8(a)(1) by maintaining four substantially similar arbitration agreements. *SolarCity Corp.*, 369 NLRB No. 141 (2020) (*SolarCity II*). In *SolarCity II*, which is before the Board on exceptions, we reverse the judge's finding of a violation and dismiss the complaint.

competition, compensation, breaks and rest periods, termination, or harassment and claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act, Genetic Information Non-Discrimination Act, and state statutes, if any, addressing the same or similar subject matters, and all other state statutory and common law claims (excluding Workers compensation, state disability insurance and unemployment insurance claims). **Claims may be brought before an administrative agency but only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims include without limitation claims or charges brought before** the Equal Employment Opportunity Commission (www.eeoc.gov), the U.S. Department of Labor (wvw.dol.gov), **the National Labor Relations Board (www.nlrb.gov).** the Office of Federal Contract Compliance Programs (www.dol.gov/esalofccp) and other similar federal and state agencies. Nothing in this Agreement shall be deemed to preclude or excuse a party from bringing an administrative claim before any agency in order to fulfill the party's obligation to exhaust administrative remedies before making a claim in arbitration.

. . . .

D. **In arbitration,** the parties will have the right to conduct civil discovery, bring motions, and present witnesses and evidence as provided by the forum state's procedural rules applicable to court litigation as interpreted and applied by the Arbitrator. However, **there will be no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action** ("Class Action Waiver"), or in a representative or private attorney general capacity on behalf of a class of persons or the general public. Notwithstanding any other clause contained in this Agreement, the preceding sentence shall not be severable from this Agreement in any case in which the dispute to be arbitrated is brought on behalf of a class of persons or the general public. Although an Employee will not be retaliated against, disciplined, threatened with discipline as a result of his or her filing of or participation in a class or collective action in any forum, the Company may lawfully seek enforcement of this Agreement and the Class Action Waiver under the Federal Arbitration Act and seek dismissal of such class or collective actions or claims.

Jt. Exh. 10.

The California 2014 Agreement states in relevant part (emphasis added):

12. *Arbitration*. In consideration of my employment with the Company, its promise to arbitrate all disputes with me, and my receipt of compensation and benefits provided to me by the Company, at present and in the future, **the Company and I agree to arbitrate any disputes between us that might otherwise be resolved in a court of law, and agree that all such disputes only be resolved by an arbitrator through final and binding arbitration,** and not by way of court or jury trial, **except as otherwise provided herein or to the extent prohibited by applicable law.** I acknowledge that this Agreement is governed by the Federal Arbitration Act, 9 U.S.C. Sec. 1 et seq., and evidences a transaction involving commerce.

A. Scope of Arbitration Agreement

(1) **Disputes which the Company and I agree to arbitrate include, without limitation,** disputes arising out of or relating to interpretation or application of this Agreement**, disputes regarding my employment with the Company or its affiliates (or termination thereof),** trade secrets, unfair competition, compensation, meal and rest periods, harassment, claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans with Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act, Genetic Information Non-Discrimination Act, all state statutes addressing the same or similar subject matters, **and all other statutory** and common law **claims** (excluding workers' compensation, state disability insurance and unemployment insurance claims). Nothing in this Agreement shall be deemed to preclude or excuse a party from bringing an administrative claim before any agency in order to fulfill that party's obligation to exhaust administrative remedies before making a claim in arbitration.

(2) **By signing below, I expressly agree to waive any right to pursue or participate in any dispute on behalf of, or as part of, any class, collective, or representative action, except to the extent such waiver is expressly prohibited by Law.** Accordingly, no dispute by the parties hereto shall be brought, heard or arbitrated as a class, collective, representative, or private attorney general action, and no party hereto shall serve as a member of any purported class, collective, representative, or private attorney general proceeding, including without limitation pending but not certified class actions ("Class

Action Waiver"). I understand and acknowledge that this Agreement affects my ability to participate in class, collective, or representative actions.

. . . .

(4) The Company may lawfully seek enforcement of this Agreement and the Class Action Waiver under the Federal Arbitration Act, and may seek dismissal of such claims. However, **the Company agrees not to retaliate, discipline, or threaten discipline against me or any other Company employee as a result of my, his, or her exercise of rights under Section 7 of the National Labor Relations Act by filing in a class, collective or representative action in any forum.**

(5) I understand that nothing contained in this Agreement shall be construed to prevent or excuse me from utilizing the Company's existing internal procedures for resolution of complaints, and this Agreement is not intended to be a substitute for the utilization of such procedures. Moreover, **this Agreement does not prohibit me from pursuing** claims that are expressly excluded from arbitration by statute (including, by way of example, claim under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203)); claims for workers' compensation benefits, unemployment insurance, or state or federal disability insurance; or **claims with** local, state, or **federal administrative bodies or agencies authorized to enforce or administer employment related laws, but only if, and to the extent, applicable law permits such agency or administrative body to adjudicate the applicable claim notwithstanding the existence of an enforceable arbitration agreement. Such permitted agency claims include filing a charge or complaint with** the U.S. Equal Employment Opportunity Commission, **the National Labor Relations Board,** the Department of Labor, the Occupational Safety and Health Commission, and the National Labor Relations Board. However, I expressly acknowledge and agree that such permitted agency claims do not include claims under California Labor Code Section 98 et seq. with the California Labor Commissioner or Division of Labor Standards Enforcement ("DLSE")—such DLSE claims must be arbitrated in accordance with the provision of this Agreement.

Jt. Exh. 9.

I. DISCUSSION

The Fifth Circuit's August 15, 2018 order having disposed of all allegations controlled by the Supreme Court's decision in *Epic Systems*, above, the remaining issue for decision is whether the Agreements unlawfully restrict access to the Board and its processes. In the prior decision, the Board resolved this issue under the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *SolarCity*, 363 NLRB No. 83, slip op. at 4–6. In *Lutheran Heritage*, the Board held, among other things, that an employer violates Section 8(a)(1) of the Act if it maintains a facially neutral work rule that employees "would reasonably construe . . . to prohibit Section 7 activity." 343 NLRB at 647.

While *SolarCity* was pending on appeal, the Board issued its decision in *Boeing*, in which it overruled the "reasonably construe" prong of *Lutheran Heritage*, announced a new standard for evaluating the lawfulness of facially neutral rules and policies, and decided to apply the new standard retroactively to all pending cases. 365 NLRB No. 154, slip op. at 2–3, 16–17. Under *Boeing*, the Board first determines whether a challenged rule or policy, reasonably interpreted, would potentially interfere with the exercise of rights under Section 7 of the Act. If not, the rule or policy is lawful and placed in Category 1(a). If so, the Board determines whether an employer violates Section 8(a)(1) of the Act by maintaining the rule or policy by balancing "the nature and extent of the potential impact on NLRA rights" against "legitimate justifications associated with the rule," viewing the rule or policy from the employees' perspective. Id., slip op. at 3.[4]

Subsequently, in *Prime Healthcare Paradise Valley, LLC*, we held that "an arbitration agreement that explicitly prohibits the filing of claims with the Board or, more generally, with administrative agencies must be found unlawful" because "[s]uch an agreement constitutes an explicit prohibition on the exercise of employee rights under the Act." 368 NLRB No. 10, slip op. at 5 (2019). We further stated that where an arbitration agreement does not contain such an explicit prohibition but rather is facially

[4] As a result of this balancing, the Board places a challenged rule into one of three categories. Category 1(b) consists of rules that are lawful to maintain because, although the rule, reasonably interpreted, potentially interferes with the exercise of Sec. 7 rights, the interference is outweighed by legitimate employer interests. Category 3, in contrast, consists of rules that are unlawful to maintain because their potential to interfere with the exercise of Sec. 7 rights outweighs the legitimate interests they serve. Categories 1(a), 1(b) and 3 designate *types* of rules; once a rule is placed in one of these categories, rules of the same type are categorized accordingly without further case-by-case balancing (for Category 1(b) and 3 rules; balancing is never required for rules in Category 1(a)). Some rules, however, resist designation as either always lawful or always unlawful and instead require case-by-case analysis under *Boeing*'s balancing framework. These rules are placed in Category 2. See id., slip op. at 3–4; *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2–3 (2019).

neutral, the standard set forth in *Boeing* applies. Id. Under that standard, the Board determines whether the arbitration agreement at issue, "when reasonably interpreted, would potentially interfere with the exercise of NLRA rights." *Boeing*, 365 NLRB No. 154, slip op. at 3.[5] The Board held that, under *Boeing*, arbitration agreements violate the Act when, "taken as a whole, [they] make arbitration the *exclusive* forum for the resolution of all claims, including federal statutory claims under the National Labor Relations Act." *Prime Healthcare*, 368 NLRB No. 10, slip op. at 6. The Board also held that "as a matter of law, there is not and cannot be any legitimate justification for provisions, in an arbitration agreement or otherwise, that restrict employees' access to the Board or its processes." Id.

Recently, in *Anderson Enterprises, Inc. d/b/a Royal Motor Sales*, we addressed the lawfulness of an agreement that required employees to arbitrate employment-related disputes, but that also included "savings clause" language informing employees that they are free to file charges with the Board. 369 NLRB No. 70 (2020). The coverage language of the arbitration agreement at issue in *Anderson Enterprises*, when reasonably interpreted, encompassed claims arising under the Act. However, the agreement's savings clause provided that "[c]laims may be brought before an administrative agency but only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims include without limitation claims or charges brought before . . . the National Labor Relations Board." Id., slip op. at 1. We found that the savings clause was sufficiently prominent, id., slip op. at 3, and it specifically and affirmatively stated that employees may bring claims or charges before the Board. Accordingly, we concluded that the agreement could not be reasonably understood to potentially interfere with employees' access to the Board and its processes and that it was lawful under *Boeing* Category 1(a). Id., slip op. at 4. In doing so, we overruled several pre-*Boeing* decisions that had found similar savings clauses legally insufficient, including the underlying decision in the instant case. Id.

Here, similar to the arbitration agreement in *Anderson Enterprises*, the Respondent's Agreements require arbitration of all employment-related disputes, necessarily including claims arising under the Act. See id., slip op. at 3. However, the Agreements contain savings clauses that explicitly permit employees to bring claims to the Board. The California 2013 Agreement contains the same savings clause as the arbitration agreement in *Anderson Enterprises*, stating:

> Claims may be brought before an administrative agency but only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims include without limitation claims or charges brought before . . . the National Labor Relations Board.

The California 2014 Agreement uses different language, but it preserves for employees the same right to file a charge with the Board:

> [T]his Agreement does not prohibit me from pursuing . . . claims with . . . federal administrative bodies or agencies authorized to enforce or administer employment related laws, but only if, and to the extent, applicable law permits such agency or administrative body to adjudicate the applicable claim notwithstanding the existence of an enforceable arbitration agreement. Such permitted agency claims include filing a charge or complaint with . . . the National Labor Relations Board.

Consistent with *Anderson Enterprises*, we conclude that these savings clauses render the Agreements lawful. They specifically and affirmatively state that employees may bring claims and charges before the National Labor Relations Board. See *Anderson Enterprises*, 369 NLRB No. 70, slip op. at 3.[6] Although it is unlikely that employees would know whether "applicable law" permits them to access the Board or permits the Board to adjudicate claims "notwithstanding the existence of an enforceable arbitration agreement," any uncertainty is immediately dispelled by language expressly clarifying that permitted claims include claims, charges, or complaints brought before or filed with the National Labor Relations Board.[7]

[5] As *Boeing* itself makes clear, a challenged rule may not be found unlawful merely because it could be interpreted, under some hypothetical scenario, as potentially limiting some type of Sec. 7 activity or because the employer failed to eliminate all ambiguities from the rule. See id., slip op. at 9.

[6] The savings clauses are also sufficiently prominent. The savings clause in the California 2013 Agreement is located immediately after the coverage language. See id. (savings clause in same location). The savings clause in the California 2014 Agreement is located just one page below the coverage language, and the Agreement's introductory paragraph notes that there are exceptions. See *Briad Wenco, LLC d/b/a Wendy's Restaurant*, 368 NLRB No. 72, slip op. at 2 (2019) (finding savings clause sufficiently prominent where separated from coverage language by one page and referenced earlier in agreement).

[7] As in *Anderson Enterprises*, the Agreements also provide that "[n]othing in this Agreement shall be deemed to preclude or excuse a party from bringing an administrative claim before any agency in order to fulfill that party's obligation to exhaust administrative remedies before making a claim in arbitration." See 369 NLRB No. 70, slip op. at 4 fn. 6. The Board did not rely on this language in finding the Agreements unlawful in the underlying decision, and the General Counsel does not rely on it to establish a violation. Accordingly, it is not necessary for us

In the underlying decision, the Board relied in part on the class- and collective-action waivers (class-action waivers) contained in the Agreements to support its finding of unlawful interference with access to the Board. See 363 NLRB No. 83, slip op. at 6. We disagree that the class-action waivers affect the outcome. First of all, the California 2013 Agreement's class-action waiver is expressly limited to disputes resolved in arbitration, stating that "*[i]n arbitration* . . . . there will be no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action." Thus, the California 2013 Agreement's class-action waiver cannot possibly have any bearing on Board charge filing.

Although the California 2014 Agreement's class-action waiver is not expressly limited to arbitration,[8] the Agreement must be read as a whole,[9] and as just discussed, it includes savings-clause language expressly preserving the right to file "a charge or complaint with . . . the National Labor Relations Board." Moreover, the class-action waiver cannot interfere with a right to file a class, collective, or representative Board action because Board procedures do not include such actions.[10] Charging parties do not represent anyone; they simply set the Board's investigatory machinery in motion. See NLRA Section 10(b) (providing in relevant part that the Board has the power to issue complaint "[w]henever it is charged that any person has engaged in or is engaging in any . . . unfair labor practice"). If a charge is found to have merit, the General Counsel prosecutes the action "'in the public interest and not in vindication of private rights.'" *Kelly Services, Inc.*, 368 NLRB No. 130, slip op. at 5 fn. 8 (2019) (quoting *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957)). It is unlikely that rank-and-file employees unfamiliar with Board law would know as much. However, it is equally unlikely they would believe to the contrary, since the California 2014 Agreement does not remotely suggest that the class-action waiver applies to Board proceedings. Employees would not reasonably assume the class-action waiver applies to Board proceedings simply because it is not expressly limited to arbitral proceedings. See *LA Specialty Produce*, 368 NLRB No. 93, slip op. at 2; *Boeing*, 365 NLRB No. 154, slip op. at 9.[11]

For these reasons, we find that the Agreements cannot be reasonably understood to interfere with employees' access to the Board and its processes. The Agreements are therefore lawful under *Boeing* Category 1(a). See *Boeing*, 365 NLRB No. 154, slip op. at 4 (holding that Category 1(a) consists of "rules that are lawful because, when reasonably interpreted, they would have no tendency to interfere with Section 7 rights") (internal footnote omitted); see also *SolarCity II*, 369 NLRB No. 141, slip op. at 4-5 (finding that the Respondent lawfully maintained four substantially similar arbitration agreements). Accordingly, we vacate the underlying decision and dismiss the complaint.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. July 29, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

to address these provisions. In any event, even if they were considered, we would find these provisions do not detract from the clear import of the savings clauses that employees are free to seek redress from the Board.

We note that a savings clause in an arbitration agreement need not necessarily expressly refer to the National Labor Relations Board, the NLRB, or the Board to sufficiently preserve employees' right to file charges with the Board. See *Hobby Lobby Stores, Inc.*, 369 NLRB No. 129, slip op. at 3 (2020) (finding legally sufficient to preserve employees' right of access to the Board savings-clause language stating that employees who sign arbitration agreement "are not giving up . . . the right to file claims with federal . . . government agencies"). Necessarily, then, there can be no question of the legal sufficiency of savings clauses like those here, which expressly and prominently refer to employees' right to bring claims or charges before the National Labor Relations Board.

[8] The California 2014 Agreement states that employees "expressly agree to waive any right to pursue or participate in any dispute on behalf of, or as part of, any class, collective, or representative action, except to the extent such waiver is expressly prohibited by law."

[9] When interpreting employer policies, the Board "'must refrain from reading particular phrases in isolation.'" *LA Specialty Produce*, 368 NLRB No. 93, slip op. at 5 (quoting *Lutheran Heritage*, 343 NLRB at 646).

[10] The Board does not have class actions, Fair Labor Standards Act–type collective actions, or Private Attorneys General Act–type representative actions.

[11] Moreover, the California 2014 Agreement also contains a provision assuring employees that "the Company agrees not to retaliate against, discipline, or threaten discipline against me or any other Company employee as a result of my, his, or her exercise of rights under Sec[.] 7 of the National Labor Relations Act by filing or participating in a class, collective or representative action *in any forum*" (emphasis added). Thus, even if employees mistakenly thought that Board procedures allowed for class, collective, or representative actions, the foregoing language would assure them that they could file such actions safely.